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Supreme Court, U.S.
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In The Supreme Court of the United States

MACERICH MANAGEMENT COMPANY and MACERICH PROPERTY MANAGEMENT COMPANY,

Petitioners,

v.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS, LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND CALIFORNIA BUSINESS PROPERTIES ASSOCIATION IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Amici Curiae make the following disclosure:

International Council of Shopping Centers ("ICSC") is a not for profit corporation organized under the Not for Profit Corporation Law of the State of Illinois. ICSC does not have a parent corporation, nor does a publicly held corporation own any of its stock.

California Business Properties Association ("CBPA") is a non-profit corporation organized under the Non-Profit Corporation Law of the State of California. CBPA does not have a parent corporation, nor does a publicly held corporation own any of its stock.

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INTEREST AND IDENTITY OF AMICI CURIAE[1]

International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry with over 60,000 members worldwide, of which over 50,000 are in the United States and over 9,000 are in the State of California. Founded in 1957, its members include developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry. ICSC's members own and manage more than 13,750 shopping centers in the State of California. In 2008, these California centers accounted for $322.1 billion in retail sales. That same year, these centers employed more than 1,528,885 persons, constituting 11.9% of the total nonagricultural employment in the state, and contributed $20.1 billion in state sales tax revenue.

California Business Properties Association ("CBPA") has over 12,000 members and has served and represented retail, commercial and industrial property owners in California for thirty-seven years. CBPA members include numerous shopping center owners, property managers, large retailers and

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[1] All counsel of record received notice of Amici's intention to file this brief at least ten days before this brief was due and Amici has received consents from all. Such consents are lodged with the Court. Amici state that no portion of this brief was authorized by counsel for a party and that no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

associated professionals. Additionally, ICSC is also a member. CBPA is also the designated legislative advocate for California Chapters of the National Association of Industrial and Office Properties ("NAIOP"), Institute of Real Estate Management ("IREM"), Building Owners and Managers Associations of California ("BOMA"), Retail Industry Leaders Association ("RILA"), California Downtown Association ("CDA"), Commercial Real Estate Women ("CREW"), Association of Commercial Real Estate-Southern California ("ACRE"), and Certified Commercial Investment Members Institute ("CCIM"), making CBPA the recognized voice of the commercial, industrial and retail real estate industries in California, as well as the largest consortium of commercial real estate professionals in California.

ICSC's and CBPA's interest in this case relates to those portions of the decision that render ineffectual certain long-standing and existing time, place and manner rules for shopping centers. Additionally, this decision severely restricts a shopping center owner's ability to regulate public access in its center in manners that detract from its and its tenants' central purpose, which is to operate a commercial business establishment. Protecting a center's existence as a commercial enterprise is of prime concern to ICSC and CBPA members who own, operate, manage and occupy such property.

DECISION BELOW

The opinion is reported at *United Brotherhood of Carpenters & Joiners of America v. NLRB*, 540 F.3d 957 (9th Cir. 2008). ICSC and CBPA refer the Court to the Brief of the Petitioners for a statement of the facts of the case and that statement is incorporated by reference.

ARGUMENT

In 1980, when this Court accepted the California Supreme Court's interpretation of the California Constitution to permit public access for the purpose of political petitioning on the private property of a shopping center, it did so subject to a property owner's right to impose reasonable time, place and manner restrictions. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) ("*PruneYard*"). At that time, the court did not view a handful of young people asking for signatures on a petition to a governmental representative as a significant interference with the business purpose of the shopping center owner; the court could not have foreseen the unintended consequences of its decision almost thirty years ago.

One such consequence is evident from the decision in this particular case; it not only requires a property owner to donate the use of its shopping mall common area to any protestors, picketers, petitioners and other such ideologues who demand the right to espouse their "constitutional free speech rights" (free

of payment and/or regard to the private property owner's own beliefs), but now, free of reasonable regulations that owners have relied upon for years.

Providing unfettered access to a shopping center property without such reasonable controls, especially for the purpose of interfering with the economic and commercial purpose of that shopping center severely diminishes any expectation of an economic return on its investment by the property owner, its tenants, and even its potential tenants. Who would spend millions of dollars developing bare land into a shopping mall for the purpose of dedicating its use to anyone who has a cause or agenda to espouse, particularly when that agenda consists of trying to cause that shopping center business (or the business of its tenants) to fail? Who would want to be part of that shopping center as a tenant?

Another unintended consequence of this particular case is the conflict that has been created by the decision. Since the decision favors labor unions, are certain regulations only applicable to those who are not members of a labor union? So, if you are a member of a labor union, no such regulations apply? This is a conflict that needs to be resolved as certainly this is not equal treatment under the law. The further dilemma of the private property owner requires a decision as to which part of the conflict he or she may have to resolve. Without the past guidelines to rely on and the creation of these conflicts, the private property owner has effectively been deprived

of the economic control of its property, a consequence that is neither protective nor equal to that owner.

CONCLUSION

The opinion in the case at bar drastically restricts and/or eliminates a property owner's ability to impose such reasonable regulations (based on long-standing guidelines) on the use of his or her property by persons who are not there to shop, but instead, to espouse their own ideological agenda which can include (pursuant to the case at bar) urging customers not to patronize the business and stores in the shopping center, all to the economic detriment of the private property owner and its tenants/occupants.

By interpreting California's free speech clause more broadly than that of the United States Constitution, this decision strikes a fatal blow to the private property owner's own First, Fifth and Fourteenth Amendment rights under the United States Constitution and significantly affects all members of ICSC and CBPA. This decision further sets a trend in the wrong direction strongly departing from *PruneYard*, especially at a time when a traditional public forum (as established by *PruneYard*) is no longer necessary. The idea of replacing the soap-box in a public square with a shopping center common area is not as important or unique as it may have been when *PruneYard* was originally decided, as many other available alternatives, such as new technology and

the internet, including e-mails, texting and other social networking media, all provide easier, cheaper and broader forms of communication.

A private property owner should not be prevented from reasonably controlling and regulating the conduct of those unrelated and uninvited third parties that come onto that property for purposes other than what was intended, developed and paid for by the private property owner. To prevent the private property owner from imposing reasonable restrictions on "free speech" activities of all parties coming onto its property, especially where the private property owner believes subjectively (and reasonably) that such parties will disrupt its own, its tenants' and its patrons' use of the property and/or (as in this case) interfere with the business of the shopping center by advocating a boycott of the business of the center, effectively results in the private property owner donating its property to subsidize the third party's ideology.

Additionally, a private property owner's own free speech right is impaired as one should not be required to speak, to defend, to answer, to respond or be intimidated or implicated in doing so by the fact that unrelated parties, being permitted to espouse their own ideas on that property owner's private property, can impute such statements onto the owner. The private property owner is forced to permit such ideologues and their views to be propounded on its

own property, regardless of whether or not such are the views of the private property owner.

Finally, to permit such state rights of the unrelated third parties to be elevated above the private property owner's own federal rights is in violation of the Supremacy Clause of the Constitution of the United States.

Amici believe that the time has come for this Court to restore to the private property owner his or her constitutional rights by reviewing and reconsidering the *PruneYard* holding and this decision in light of current technology and availability of other means for parties to espouse their "free speech" without using, for free, the private property of others.

For all of the reasons set forth above, Amici respectfully request this Court to grant certiorari.

DATED: September 23, 2009

Respectfully submitted,

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